

A microscopic view of several COVID-19 virus particles, showing their characteristic spherical shape with prominent, irregular spikes (glycoprotein spikes) extending from the surface. The particles are rendered in a light blue, translucent style against a darker teal background.

COVID-19

ESIGNATURES FOR CONTRACTS AND OTHER DOCUMENTS

TECHNOLOGY

Remote working: eSignatures for contracts and other documents

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Remote working: eSignatures for contracts and other documents

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Social distancing has meant that contracts and other documents that might have been signed by hand are now having to be executed and exchanged electronically. In this article, we take a brief look at the laws applicable in Ireland that make this possible for certain documents but unavailable for others.

Relevant laws in Ireland

The Electronic Commerce Act 2000 (eCA) implemented EU Directive 1999/93/EC on e-signatures. That Directive was replaced by Regulation (EU) No. 910/2014 (eIDAS Regulation), which has applied since 1 July 2016. Amongst its purposes is to provide a common EU legal framework and single market for the recognition of electronic signatures. Its enactment as an EU Regulation means it has direct effect under the laws of all EU member states. The eCA remains the principle Irish legislation for electronic signatures.

This article focusses on electronic signatures. However, the above laws deal with other matters relevant to online communications including legal recognition of electronic contracts, electronic writing and original information in electronic form, and providing a common EU legal framework for electronic identification for public sector online services.

Legal recognition of electronic signatures

Irish law provides for the validity and enforceability of electronic signatures. Generally, where a person or a public body is required to provide a signature, an electronic signature can be used.

The enforceability of an electronic signature will depend on the ability to authenticate it. The eIDAS Regulation distinguishes between different standards of electronic signature ranging from a basic electronic signature to more robust standards that uniquely link to the signatory. These standards are defined in a technology neutral manner to accommodate future means of electronic signature.

What Irish laws are excluded?

The eCA excludes the use of electronic signatures for wills, trusts and enduring powers of attorney; affidavits and statutory or sworn declarations; and documents required under the rules and practices or procedures of a court or tribunal. The eCA permits a contract for the sale of land to be executed electronically. However, documents for the creation, acquisition, disposal or registration of interests in real property must be evidenced in traditional forms of writing.

The eCA does not affect the operation of Irish laws relating to uncertificated securities, criminal evidence or the imposition, collection or recovery of tax or other Government imposts.

Electronic signatures

An *electronic signature* is data in electronic form which is attached to or logically associated with other data

in electronic form and which is used by a signatory to sign. In practice, this is the basic or entry-level electronic signature, such as a scanned copy of a signature or a person's inclusion of his/her name in an email.

Advanced electronic signatures

An *advanced electronic signature* (AdES) is an electronic signature that is (a) uniquely linked to the signatory; (b) capable of identifying the signatory; (c) created using electronic creation data that the signatory can, with a high level of confidence, use under his/her sole control; and (d) linked to the data to which it relates in such a way that any subsequent change to the data is detectable.

An AdES is intended to ensure the identity of the originator and that the electronic communication has not been tampered with prior to receipt. In practice, this authentication is typically achieved through the issue of a digital certificate by a trust service provider, who has verified the identity of the signatory.

Qualified Electronic Signatures

The eIDAS Regulation introduced a *qualified electronic signature* (QES) as a further enhanced standard.

While an AdES and QES are uniquely linked to the signor, a QES is created using a '*qualified electronic signature creation device*' and is based on a '*qualified certificate for electronic signature*' that can only be issued by a '*qualified trust service provider*' (QTSP).

QTSPs are accredited and subject to supervision by EU member state supervisory bodies. The Department of Communications, Climate Action & Environment (DCCAE) supervises Irish established QTSPs. Both the Irish and European Commission 'trusted lists' of QTSPs are available through the [DCCAE's website](#). QTSPs are permitted to use the EU 'trust mark' to indicate their qualified status.

Unlike a 'basic' electronic signature or an AdES, a QES has equivalent legal effect to a handwritten signature. Furthermore, a QES based on a qualified certificate issued in one EU member state must be accepted as a QES in all other EU member states.

eCA – consent, witnessing and seals

The eCA requires that the person or public body receiving an electronically signed document must have agreed to it being electronically signed. In practice, 'consent' can be provided or obtained in standard form terms and conditions of business, as a specific term in transactional documents, by exchange of emails or possibly by course of dealing.

The eCA provides formalities for the witnessing of an electronic signature and for electronically executing a document under seal, which are not required by the eIDAS Regulation. Other Irish laws are relevant when executing documents under seal, for example section 64(1)(a) of the Land Conveyancing Law Reform Act 2009 removed the need for an individual to use a seal in order to make a document under deed. Therefore, it is often prudent to obtain legal advice if electronic signatures must be witnessed or the document must be executed under an electronic seal.

What standard is appropriate?

While a QES is the EU gold standard for electronic signatures, a 'basic' electronic signature and an AdES are generally legally effective and admissible as evidence in legal proceedings. However, unlike a QES, those other standards may require additional evidence to verify the authenticity of the signature if this were ever disputed.

A 'basic' electronic signature may be appropriate for the signature of board meeting minutes and resolutions (subject to constitutional documents) or for low value/risk utility and vendor agreements. However, 'basic' electronic signatures may not be suitable for key contracts or other instruments, particularly those which may expose an organisation to significant risks - financial, regulatory or otherwise. Therefore, for contracts of that type, an AdES or a QES would be appropriate.

The advantage of a QES over an AdES is its legal equivalence to a handwritten signature, such that no

additional information should be required to authenticate the signature, and their mutual recognition across EU member states.

If a contract or other instrument involves parties in different EU member states and/or is subject to laws and courts of an EU member state other than your own, a QES based on a qualified certificate would be the sensible choice. If a counterparty happens to be located outside of the EU and/or a contract is subject to the laws and courts of a non-EU member state, it would be prudent to obtain advice on the formalities and requirements for electronic signatures in that jurisdiction.

Using a trust service provider ensures the electronic signature service is subject to standards set by the eIDAS Regulation and supervisory body oversight. This gives a level of assurance not available when using one's own 'basic' electronic signature.

About the Author